

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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DIVINE MCNEIL,

Petitioner,

-v-

NYSDOCS COMM ANTHONY J.
ANNUCCI,

Respondent.
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USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 6/11/2019

18-CV-1560 (VSB) (HP)

OPINION & ORDER

Appearances:

Divine McNeil
Pro se Petitioner

Nancy Darragh Killian
Bronx District Attorney
New York, New York
Counsel for Respondent

VERNON S. BRODERICK, United States District Judge:

Pro se Petitioner Christopher Henry filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, (the “Petition,” Doc. 1), on January 5, 2018,¹ while incarcerated at the Downstate Correctional facility.² Before me is the Report and Recommendation of United States Magistrate Judge Henry Pitman, (the “Report and Recommendation” or “R&R,” Doc. 29), issued on May 9, 2019, recommending that I deny the Petition in all respects, that a certificate of appealability not be issued, and that certification pursuant to 28 U.S.C. § 1915(a)(3) not be

¹ A prisoner’s filings are deemed filed on the date they are delivered to prison officials for mailing. *See Hodge v. Greiner*, 269 F.3d 104, 106 (2d Cir. 2001). Therefore, I treat the signature date on documents filed by Petitioner as the presumptive filing date of those documents.

² This action was originally filed in the Eastern District of New York, (*see* Doc. 1), and was transferred to this District on August 2, 2017, (Doc. 14).

issued. No objections, timely or otherwise, or a request for additional time to file such objections, have been filed. Because I agree with Magistrate Judge Pitman's determination that Petitioner has failed to exhaust his state remedies or offer a valid explanation for his failure to do so, I ADOPT the Report and Recommendation in its entirety. Accordingly, Respondent's motion to dismiss the Petition is GRANTED.

In reviewing a magistrate judge's report and recommendation, a district court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). "If a party timely objects to any portion of a magistrate judge's report and recommendation, the district court must make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." *Bush v. Colvin*, No. 15 Civ. 2062 (LGS) (DF), 2017 WL 1493689, at *4 (S.D.N.Y. Apr. 26, 2017) (quoting *United States v. Romano*, 794 F.3d 317, 340 (2d Cir. 2015)). Where, however, a party does not timely object to a report and recommendation, a district court reviews the report and recommendation for clear error. *DiPilato v. 7-Eleven, Inc.*, 662 F. Supp. 2d 333, 339 (S.D.N.Y. 2009); *Lewis v. Zon*, 573 F. Supp. 2d 804, 811 (S.D.N.Y. 2008); *Wilds v. United Parcel Serv., Inc.*, 262 F. Supp. 2d 163, 169 (S.D.N.Y. 2003).

Petitioner has not submitted objections to the Report and Recommendation; therefore, I apply the clear error standard. *DiPilato*, 662 F. Supp. 2d at 339; *Lewis*, 573 F. Supp. 2d at 811; *Wilds*, 262 F. Supp. 2d at 169. I have carefully reviewed the thorough and well-reasoned Report and Recommendation, and I find no error in Magistrate Judge Pitman's reasoning and conclusions. I am therefore in complete agreement with Magistrate Judge Pitman and hereby ADOPT the Report and Recommendation in its entirety. Respondent's motion to dismiss the Petition, (Doc. 23), is GRANTED. The Clerk of Court is respectfully directed to terminate all pending motions and close the case.

In addition, because Petitioner has not made a substantial showing of the denial of a constitutional right, a certificate of appealability will not issue, *see* 28 U.S.C. § 2253, and the Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal from this Order would not be taken in good faith.

The Clerk of Court is further directed to mail a copy of this Order to the pro se Petitioner.

SO ORDERED.

Dated: June 11, 2019

New York, New York

A handwritten signature in black ink, reading "Vernon Broderick". The signature is written in a cursive, flowing style. The first name "Vernon" is written with a large, prominent "V" and "n". The last name "Broderick" is written with a large "B" and "r". The signature is written over a horizontal line.

Vernon S. Broderick
United States District Judge